DCLC
Durham Community Legal Clinic
& Access to Justice Hub

Written Submissions to:

Standing Committee on Justice Policy

of the

Legislative Assembly of Ontario

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Re: Bill 218, *Supporting Ontario's Recovery Act, 2020*

DCLC
Durham Community Legal Clinic

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About

The **Durham Community Legal Clinic (DCLC)** is a Community Legal Clinic that provides legal services, information, education, and representation for historically marginalized and low-income residents of Durham Region. DCLC also engages in advocacy and law reform activities, in particular to ensure that our laws properly consider the perspectives of historically marginalized and low-income Ontarians, and appropriate harmonization of new laws. The main areas of legal services DCLC provides includes human rights, employment law, housing and tenancy issues, and social benefits, all of which interact in some manner with civil claims that involve negligence or a reasonableness standard.

The **Durham Access to Justice Hub®** (the "Hub") was established by the clinic in 2019 with the assistance of LAO. This inter-agency and inter-disciplinary initiative intended to provide legal services beyond the income thresholds and subject matter of LAO, and other social, financial, and psychological services. These cooperative relationships seek to foster better client-centered services, reduce administrative barriers and silos, and improve efficiency of services that are funded or subsidized by taxpayer dollars. Some techniques used to achieve these goals include recruitment of volunteers to contribute towards improving access to justice, and by embedding students into workflows and innovative projects through experiential education. Through the Hub, DCLC provides even broader services to focus on the root causes of poverty, and engages in deeper forms of poverty alleviation, which includes examining legal changes that could have unintended effects of low-income populations.

Author

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Background

1. Bill 218, *Supporting Ontario's Recovery and Municipal Elections Act, 2020*, was introduced on October 20, 2020. The bill includes two schedules, the second of which focuses on municipal elections.
2. These submissions focus on Schedule I of Bill 218, which creates the *Supporting Ontario's Recovery Act, 2020* (the "Act"). This act was created specifically due to the concerns of increased liability due to exposure to the COVID-19 coronavirus.
3. The uncertainties around COVID-19, including the risk of exposure, appropriate administrative or engineering controls, and risk of liability, have created significant operational risk throughout the private sector. This risk has implications for insurance coverage, but also a flood of potential lawsuits, for which there is little or no legal certainty.
4. This Act attempts to provide some clarity on the subject, by removing a cause of action for COVID-19 exposure, under certain conditions.
5. While these measures may be warranted and even necessary in light of the unprecedented nature of the pandemic, there are some concerns with how this Act has been proposed.

Overview

6. The primary concern is that the exclusion of liability is overly broad, lacks sufficient precision to be an effective mechanism for limiting liability, and may even encourage unnecessarily risky or irresponsible behaviour.
7. The protection from liability under the Act requires under s. 2 that there is "a good faith effort" to follow public health guidance or laws relating to COVID-19, even where there is a conflict or inconsistency between this guidance or laws.
8. Given the unusual circumstances around the pandemic, this may indeed be a reasonable position for the legislature to take in the circumstances. Public health guidance is defined in the Act as including a wide variety of individuals, including the Chief Medical Officer of Health; Associate Chief Medical Officer of Health; Office of the Chief Medical Officer of Health; a medical officer of health or associate medical officer; a public health official; or an officer or employee of a governmental minister or ministry, agency, municipal or regulatory body.
9. The potential for conflicting instructions between these various parties, and with these instructions and any pre-pandemic laws, is high. As a result, DCLC does not take a position on these particular provisions, as they may indeed be justifiable in the unique circumstances of the pandemic.
10. However, s. 1 of the Act defines a "good faith effort" as "an honest effort, whether or not that effort is reasonable" [emphasis added]. Removing a reasonableness

analysis entirely from a negligence analysis is unwarranted, unnecessary, and potentially overbroad. Constituting immunity from liability in this manner would effectively allow for members of society to completely ignore all public health advice, or any other laws around COVID-19, all under the guise of a "good faith effort" that is not reasonably assessed. DCLC's position is that good faith can only be properly ascertained with a reasonableness standard, taking into account the unique and uncertain context of the pandemic, especially as it relates to appropriate measures.

Analysis

Use of Good Faith in the Common Law Generally

11. Currently the leading contract case on good faith doctrine in Canada is the Supreme Court of Canada's decision in *Bhasin v. Hrynew*.[1] Although arising in the context of contractual disputes, this case still provides important guidance about the Court's understanding of good faith as it might be adopted in other contexts.

12. The Court in *Bhasin* notes that good faith has deep roots in the common law, but conflicting positions in the context of contracts as well,

> [35] The doctrine of good faith traces its history to Roman law and found acceptance in early English contract law. For example, Lord Northington wrote in *Aleyn v. Belchier* (1758), 1 Eden 132, 28 E.R. 634, at p. 637, cited in *Mills v. Mills* (1938), 60 C.L.R. 150 (H.C.A.), at p. 185, that "[n]o point is better established than that, a person having a power, must execute it *bona fide* for the end designed, otherwise it is corrupt and void." Similarly, Lord Kenyon wrote in *Mellish v. Motteux* (1792), Peake 156, 170 E.R. 113, "in contracts of all kinds, it is of the highest importance that courts of law should compel the

[1] 2014 SCC 71 (CanLII), [2014] 3 SCR 494 ["*Bhasin*"].

> observance of honesty and good faith": p. 113-14. In *Carter v. Boehm* (1766), 3 Burr. 1905, 97 E.R. 1162, at p. 1910, Lord Mansfield stated that good faith is a principle applicable to all contracts; see also *Herbert v. Mercantile Fire Ins. Co.* (1878), 43 U.C.Q.B. 384; R. Powell, "Good Faith in Contracts" (1956), 9 *Curr. Legal Probs.* 16.
>
> [36] However, these broad pronouncements have been, for the most part, restricted by subsequent jurisprudence to specific types of contracts and relationships, such as insurance contracts, leaving unclear the role of the broader principle of good faith in the modern Anglo-Canadian law of contracts: *Chitty on Contracts* (31st ed. 2012), vol. I, *General Principles*, at para. 1-039; W. P. Yee, "Protecting Parties' Reasonable Expectations: A General Principle of Good Faith" (2001), 1 *O.U.C.L.J.* 195, at p. 195; E. P. Belobaba, "Good Faith in Canadian Contract Law", in *Special Lectures of the Law Society of Upper Canada 1985 — Commercial Law: Recent Developments and Emerging Trends* (1985), 73, at p. 75. One leading Canadian contracts scholar went so far as to say that the common law has taken a "kind of perverted pride" in the absence of any general notion of good faith, as if accepting that notion "would be admitting to the presence of some kind of embarrassing social disease": J. Swan, "Whither Contracts: A Retrospective and Prospective Overview", in *Special Lectures of the Law Society of Upper Canada 1984 — Law in Transition: Contracts* (1984), 125, at p. 148.

13. The Court in *Bhasin* struggles on how to reconcile this with the reasonable expectations of contractual parties,[2] but concludes that good faith should be organized to be consistent with reasonable commercial expectations to provide certainty and coherence in the law.[3] The Court also notes that a contextual approach is necessary to understand good faith in a wide variety of contexts, but that this would still require an examination of honesty and reasonableness in performance from an objective perspective.[4]

14. A good faith effort requires more than just honesty, and may require reasonable steps. Although the Court refrained from defining the general limits of an organizing principle of good faith in this case, they added a general duty of honest contractual

[2] *Ibid* at paras 32, 34.
[3] *Ibid* at paras 62, 66.
[4] *Ibid* at para 69.

performance, with an expectation that this principle of good faith would be interpreted further by the courts.[5]

15. In Ontario, the Court of Appeal distinguished between conduct that is less than honourable from conduct that rises to the high threshold for a breach of the duty of honest performance.[6] They also distinguished it from circumstances where a consulting contract, where there was no attempt to redress the problem, as a violation of good faith.[7] Intrinsic to this decision is a fact-specific and contextual approach that assesses the reasonableness of the conduct of the parties in the circumstances. No such analysis would be possible under Bill 218, even if a defendant disregarded public health advice or violated the laws, as they would simply be able to rely on an objective statement of good faith.

16. The lack of good faith conduct has been defined in case law as "…when a party acts in "bad faith" - a conduct that is contrary to community standards of honesty, reasonableness or fairness."[8] A reference to honesty, without a community standard, and disregarding reasonableness or fairness, would be a novel and unusual manner to implement a good faith standard in the law.

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[5] *Ibid* at para 89-93. Courts have interpreted *Bhasin* in a manner that does not create a freestanding cause of action for good faith; *McDonald v Brookfield Asset Management Inc*, 2016 ABCA 375 at para 57; *Sew Cozzi Ventures Inc. v Apex Outdoor Innovations Corp*, 2017 BCSC 481 at para 278. The concerns about a good faith conduct that is absent from any reasonableness is that it could give rise to "some measure of dishonesty, or at least a lack of straightforwardness;" *Bhasin* at para 70.
[6] *CM Callow Inc. v. Zollinger*, 2018 ONCA 896 (CanLII) at para 16, leave to appeal to SCC granted.
[7] *Mohamed v. Information Systems Architects Inc.*, 2018 ONCA 428 (CanLII).
[8] *Arton Holdings Ltd. et al. v. Gateway Realty Ltd.*, 1991 CanLII 2707 (NSSC); aff'd, 1992 NSCA 70 (CanLII).

17. Bad faith in contracts includes conduct that is dishonest, and suggests malice, untruthfulness, ulterior motive.[9] Removing reasonableness from good faith means that all of this type of behaviour can still be defended as in "good faith," as dishonesty that is limited to proof of malice, untruthfulness, or ulterior motive, is a very high threshold, that may be impossible in most cases to provide. It can even allow for behaviour that would be an "improper motive or other intentional conduct equivalent to fraud."[10]

18. Similar concepts can be found in civil litigation, such as employment law. The Supreme Court of Canada discussed bad faith damages in *Wallace v. United Grain Growers Ltd.*,[11] the Court stated,

> 98 The obligation of good faith and fair dealing is incapable of precise definition. However, at a minimum, I believe that in the course of dismissal employers ought to be candid, reasonable, honest and forthright with their employees and should refrain from engaging in conduct that is unfair or is in bad faith by being, for example, untruthful, misleading or unduly insensitive. In order to illustrate possible breaches of this obligation, I refer now to some examples of the conduct over which the courts expressed their disapproval in the cases cited above.
> [emphasis added]

19. The Court narrowed the use of these types of punitive damages in *Honda Canada Inc. v. Keays*,[12] indicating that they should only be awarded in those circumstances of bad faith. However, Bill 168 could allow for conduct around COVID-19 exposure

[9] *Greater Vancouver Sewerage and Drainage District v. Wastech Services Ltd.*, 2019 BCCA 66 (CanLII) at para 71; leave to appeal to SCC granted.
[10] *Crawford v. New Brunswick (Agricultural Development Board)*, 1997 CanLII 9539 (NBCA), at para 15.
[11] 1997 CanLII 332 (SCC), [1997] 3 SCR 701
[12] 2008 SCC 39 (CanLII), [2008] 2 SCR 362.

that is untruthful, misleading, or unduly insensitive, but justified as subjectively in good faith as defined in the Act.

20. Allegations of good faith, or the lack thereof, are closely connected to courts imposing punitive damages generally. Bad faith may constitute an actionable wrong, but should be assessed properly, in a consistent manner with the basic purposes of tort law.[13] Redefining good faith in this manner could unfairly reconstitute insurance claims, and provide a basis for widespread denial by insurers of otherwise compensable claims, especially because bad faith can also include serious carelessness or recklessness. This can only be assessed objectively by a reasonableness standard.[14]

21. The reasonableness standard is also used in the commercial litigation context to assess fraud. The Supreme Court of Canada stated in *R. v. Zlatic*,[15]

> The fundamental question in determining the *actus reus* of fraud within the third head of the offense of fraud is whether the means to the alleged fraud can properly be stigmatized as dishonest:… In determining this, one applies the standard of the reasonable person. Would the reasonable person stigmatized what was done as dishonest? Dishonesty is, of course, difficult to define with precision. It does, however, connote an underhanded design which has the effect, or which engenders a risk, of depriving others of what is theirs. J.D. Ewart, in his *Criminal Fraud* (1986), defines dishonest conduct as that "which ordinary, decent people would feel was discreditable as being clearly at variance with straightforward or honourable dealings" (p. 99). Negligence does not suffice. Nor does taking advantage of an opportunity to someone else's detriment, where that taking has not been occasioned by unscrupulous conduct, regardless of whether such conduct was wilful or reckless….A use is "wrongful" in this context if it constitutes conduct which reasonable decent persons would consider dishonest and unscrupulous.
> [emphasis added]

[13] *Whiten v. Pilot Insurance Co.*, 2002 SCC 18 (CanLII), [2002] 1 SCR 595.
[14] *Finney v. Barreau du Québec*, 2004 SCC 36 (CanLII), [2004] 2 SCR 17 at paras 39-42.
[15] 1993 CanLII 135 (SCC), [1993] 2 SCR 29.

22. By removing reasonableness around conduct connected to COVID-19 exposure, Bill 218 could not just immunize against negligence claims, but could also insulate against claims of fraud. This should be of significant concern to the entire legislature.
23. Creating a statutory definition of good faith that is independent of any reasonableness analysis, even in the COVID-19 context, creates unnecessary confusion in the law. Reasonableness is the standard that is routinely used in the negligence analysis, and the context of the pandemic would necessarily be incorporated into this analysis, especially if there is explicit reference to existing laws or guidance from public health officials. This approach therefore goes too far in trying to minimize the adverse impacts of the pandemic, and instead provides a license and immunity for bad behaviour.

Comparisons to Other Statutory Good-Faith Immunity

24. A better understanding of how statutory immunity applying a good faith standard may work better may be gleaned from other examples of its use in Ontario.
25. In response to the Severe Acute Respiratory Syndrome (SARS) outbreak in 2003, both levels of government examined the issue of liability within our health care system.

26. The federal Naylor Report made only a passing reference to the liability of provinces for operations under a Health Emergency Response Team (HERT).[16]
27. The provincial Campbell Report deliberately sought to explore the response to SARS, without making any civil or criminal findings.[17] The purpose for this approach was to promote fact finding, and to encourage a better understanding of risk.[18] It did suggest that there be some protection from liability for acts that were *necessitated* by an emergency.[19]
28. Soon after this, Justice Stephen Goudge led a public inquiry to restore and enhance the public confidence in pediatric forensic pathology.[20] Justice Goudge noted the failure of the Office of the Chief Coroner for Ontario's (OCCO)'s processes to properly identify to the Crown cases of incompetence or negligence.[21]
29. From all of these reports, including the ones directly stemming from SARS, we can see that despite a strong public interest in accountability, our fact-finding inquiries

[16] David Naylor, "Learning from SARS: The Renewal of Public Health in Canada," 2003, Public Health Agency of Canada, at 102-103, available at: <https://www.canada.ca/content/dam/phac-aspc/migration/phac-aspc/publicat/sars-sras/pdf/sars-e.pdf>.
[17] Justice Archie Campbell, "Commission to Investigate the Introduction and Spread of SARS in Ontario," 2006, Final Report, Vol. 1 at 9-10 [the "Campbell Report, Vol. 1"], available at: <http://www.archives.gov.on.ca/en/e_records/sars/report/v1-pdf/Volume1.pdf>;
Vol. 2, at 10, 13 ["Campbell Report, Vol. 2"], available at: <http://www.archives.gov.on.ca/en/e_records/sars/report/v2-pdf/Volume2.pdf>.
[18] Campbell Report, Vol. 2, *ibid*, at 16-17.
[19] Campbell Report, Vol. 1, *supra* note 17, at 62.
[20] Hon. Stephen Goudge, "Inquiry into Pediatric Forensic Pathology in Ontario," 2008, available at: <https://www.attorneygeneral.jus.gov.on.ca/inquiries/goudge/report/v1_en_pdf/Vol_1_Eng.pdf>
[21] *Ibid* at 29.

have failed to fully identify what the appropriate level of immunity is for professionals and others working in these contexts.

30. The Second Interim Report of the Campbell Report did make a number of recommendations in this regard, including amending s. 95(1) of the *Health Protection and Promotion Act*[22] to extend the protection from personal liability being the persons identified in this section. This was added to the act under Bill 171.[23]

31. Similar provisions were added to s. 11(1) of the *Occupational Health and Safety Act* under Bill 56,[24] the *Emergency Management Act* under Bill 148,[25] and to several other statutes under Bill 212.[26]

32. Despite these limitations on liability, the Bill 171 amendments under s. 95(1.2) of the *HPPA* make reference to good faith exercise or performance of acts or duties, but do not attempt to define good faith, and do not remove in any way a reasonableness analysis of this same good faith exemption. The amendments did not remove the provisions under s. 95(3), which says that a board of health is not

[22] RSO 1990, c H.7 [the *"HPPA"*].
[23] *Health System Improvements Act, 2007*.
[24] *Emergency Management Statute Law Amendment Act, 2006*. Notably this Bill did not remove any Crown liability under s. 11(2), and in reference to the *Proceedings Against the Crown Act*, which is similar to the approach taken by these other bills, including in regards to the *Crown Liability and Proceedings Act, 2019*, SO 2019, c 7, Sch 17.
[25] *Emergency Readiness Act, 2002*.
[26] *Good Government Act, 2009*.

relieved of lability for damages caused by negligence, i.e. on an objective standard of reasonableness.[27]

33. Bill 218 introduces a form of immunity in relation to good faith efforts, in a manner that has not been used before. The term, "an honest effort, whether or not that effort is reasonable," cannot be found anywhere in any reported case or reported statute in Canada. Other Canadian jurisdictions use the more common term of "reasonable belief," which would be more appropriate in the circumstances.[28]

34. Bill 218 even lowers the standard of care for professionals working in the area, who may infect or expose others to COVID-19, including physicians, who are normally held at an elevated standard of the "degree of care and skill which could reasonably be expected of a normal, prudent practitioner of the same experience and standing..."[29]

35. This type of good faith immunity for physicians is also unprecedented, and would be fundamentally inconsistent with the standards of professional competence by licensed physicians and other health care professionals.[30] It would create the type

[27] This provision was upheld as a basis to maintain liability against a Regional Municipality in *St. Elizabeth Home Society v. Hamilton (City)*, 2005 CanLII 46411 (ONSC), noting at para 96 that this exclusion of liability was for individuals only.
[28] Anita Balakrishnan, "Law to shield businesses that spread COVID-19 could benefit insurers, limit consumers," Toronto Star, Oct. 22, 2020, available at: < https://www.thestar.com/business/2020/10/22/law-to-shield-businesses-that-spread-covid-19-could-benefit-insurers-limit-consumers.html>.
[29] *Sylvester v. Crits et al.*, 1956 CanLII 34 (ONCA); *Kennedy v. Jackiewicz*, 2004 CanLII 43635 (ONCA); *Manary v. Strban*, 2013 ONCA 319 (CanLII) at paras 95-96; *Aucoin v. St. Catharines General Hospital*, 1998 CanLII 2779 (ON CA) at para 8. See generally, *Housen v. Nikolaisen*, 2002 SCC 33 (CanLII), [2002] 2 SCR 235; *Eady v. Tenderenda*, 1974 CanLII 186 (SCC), [1975] 2 SCR 599
[30] Andrew Flavelle Martin, "Statutory Good-Faith Immunity for Government Physicians: Cogent Policy

of situation where physicians and other health care professionals are disciplined by a regulatory conduct for their decisions related to COVID-19, but are insulated entirely from any civil liability.

Common Law Protections

36. Bill 218 as proposed is also unnecessary, as it is unlikely that widespread liability around COVID-19 exposure would occur. Previous experiences with similar situations already illustrate these protections.

37. In *Eliopoulos Estate v. Ontario (Minister of Heath and Long Term Care)*,[31] Justice Sharpe of the Court of Appeal reviewed the provisions of the *HPPA* in the context of the West Nile Virus, and concluded that they created discretionary powers not capable of creating a private law duty, due to an insufficient proximity from a general risk faced by all members of the public,

> [17] … I fail to see how it could be possible to convert any of the Minister's public law discretionary powers, to be exercised in the general public interest, into private law duties owed to specific individuals…

38. He also concluded that that even if there was sufficient proximity under the Cooper/Anns test, that there would be residual policy considerations that would speak against the imposition of a new duty of care,

> [33] …to impose a private law duty of care on the facts that have been pleaded here would create an unreasonable and undesirable burden on Ontario that would interfere with sound decision-making in the realm of public health. Public health priorities should be based on

or a Denial of Justice?," *McGill Journal of Law and Health 4(2)*.
[31] 2005 CanLII 18883 (ONSCDC); 2006 CanLII 37121 (ON CA); leave to appeal ref'd 2007 CanLII 19108 (SCC).

> the general public interest. Public health authorities should be left to decide where to focus their attention and resources without the fear or threat of lawsuits.

39. Similarly, in *R. v. Abarquez*,[32] Justice Sharpe heard five related appeals jointly at the Court of Appeal,[33] dealing with claims for damages by nurses who contracted SARS during the 2003 outbreak, on the basis that *Eliopoulos* had changed the state of the law in Ontario.

40. Even with a greater proximity between the government and the nurses involved, who had to follow health and safety directives, there was still insufficient proximity as to impose a duty of care. Justice Sharpe stated,

> [20] As we held in *Eliopoulos* and *Williams*, while Ontario is obliged to protect the public at large from the spread of communicable diseases such as West Nile Virus and SARS, Ontario does not owe individual residents of the province who contract such diseases a private law duty of care giving rise [to] claims for damages. This is equally true for nurses and other health care workers in the province. Nurses were, by virtue of their profession, in the eye of the SARS storm, but they had no higher claim to have their health protected by Ontario than any other resident of the province. To the extent that the statement of claim rests upon assertions that Ontario was negligent in the manner in which it managed the SARS crisis or that there was a general duty of care owed by Ontario to protect the health of nurses and that the Directives failed to do enough to protect them from getting SARS, it must be struck.

41. Justice Sharpe noted that creating such a special duty with nurses could conflict with an overarching duty to protect the public at large, and the interests of nurses could not be prioritized over that of the general public.[34] He did not analyze the

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[32] 2005 CanLII 29498 (ONSC); 2009 ONCA 374 (CanLII); leave to appeal ref'd 2009 CanLII 71471 (SCC) ["*Eliopoulos*"].
[33] *Williams v. Canada (Attorney General)* (2009), 2009 ONCA 378 (CanLII) ["*Williams*"]; *Laroza v. Ontario*, [2009] O.J. No. 1820, 2009 ONCA 373; *Henry Estate v. Scarborough Hospital -- Grace Division*, [2009] O.J. No. 1821, 2009 ONCA 375; *Jamal Estate v. Scarborough Hospital -- Grace Division*, [2009] O.J. No. 1822, 2009 ONCA 376.
[34] *Ibid* at paras 27-29. See also, *Cooper v. Hobart*, 2001 SCC 79 (CanLII), [2001] 3 SCR 537 at para 44; *Edwards v. Law Society of Upper Canada*, 2001 SCC 80 (CanLII), [2001] 3 SCR 562 at para 14; *Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38 (CanLII), [2007] 3 SCR 83 at paras 28, 41.

residual policy concerns for negating a duty of care, but noted at para 41 that the plaintiffs still had a legal remedy under the no-fault insurance scheme.[35] A similar remedy is available under Bill 218 in s. 4, which excludes the protection of liability from Schedule 1 and Schedule 2 employers.

42. Even if Bill 218 was not introduced, it's unlikely given the current state of the law that reasonable conduct by any members of society would result in civil liability for COVID-19 exposure, whether through proximity, or any residual policy grounds.

Recommendations

43. The recommendation sought from this submission is a simple revision of good faith, to be consistent with the state of law in Ontario:

> 1 (1) In this Act,
>
> "good faith effort" includes an honest effort~~, whether or not that effort is reasonable~~; ("effort de bonne foi")

44. DCLC takes no position on the remainder of Bill 218 at this time.

[35] *Workplace Safety and Insurance Act*, 1997, SO 1997, c 16, Sch A.

Conclusions

45. Tort law and reform is necessarily responsive to societal needs. The legal needs of Ontarians following the pandemic are novel and unprecedented. The ability of government to make these types of changes to tort law were summarized by the Supreme Court of Canada in *Swinamer v. Nova Scotia (Attorney General)*,[36]

> If the Crown wishes to exempt itself [or others] from tortious liability… it is a simple matter to legislate to that effect, and to leave the propriety of that legislative action for the voters' consideration.

46. Some limitations or exclusion from liability is likely warranted in the circumstances, especially given the financial aftermath that is expected from the pandemic. Doing so will ensure that many responsible businesses, employers and industries are not inundated with lawsuits due to COVID-19 exposure, whether that exposure actually results in harm or not. The ability to demonstrate clear causation, and excluding the possibility that the virus was acquired from another source, will remain challenging.[37]

47. Bill 218 addresses this need, and then takes it one step too far. Good faith must necessarily be assessed objectively. It requires reasonableness. It cannot function without it, and excluding reasonableness entirely from the standard allows for actions by bad actors that can and will harm society.

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[36] 1994 CanLII 122 (SCC), [1994] 1 SCR 445.
[37] Such circumstances may give rise to the still novel and untested material contribution test; Emir Crowne and Omar Ha-Redeye, "Clements v. Clements: A Material Contribution to the Jurisprudence - The Supreme Court of Canada Clarifies the Law of Causation," 2012, *University of Western Ontario Journal of Legal Studies 2(2)*.

48. The ones who will be harmed the most from this type of unreasonable conduct will be the most vulnerable members of society, including historically marginalized and low-income populations. The public policy rationale for apportioning risk and liability in society does not justify uniform and blanket immunity around COVID-19, irrespective of the objective circumstances. Doing so ensures that abuse will occur.
49. Removing reasonableness from the good faith analysis, and the corresponding responses from businesses and industry, means that there will be less responsible behaviour. Bill 218 cannot remove liability from this activity entirely, especially where such claims involve s. 7 *Charter* claims.[38] Falsely emboldened by this new legislation, unreasonable conduct could increase, which would increase the number of new lawsuits containing *Charter* claims, thereby defeating the objectives sought in this legislation.
50. Bill 218 can still proceed and achieve its objectives by defining "good faith" as an honest effort, and without indicating that this will be assessed "whether or not that effort is reasonable." This is the appropriate and balanced manner in which to proceed, even in light of the uncertainties of the pandemic.

[38] Irelyne Lavery, "Class action launched on behalf of residents at 96 Ontario long-term care facilities, DH News, July 29, 2020, available at: <https://dailyhive.com/toronto/class-action-launched-ontario-long-term-care-facilities-coronavirus>; Rochon Genova LLP, "Long Term Care Homes - Covid 19," June 1, 2020, available at: <https://www.rochongenova.com/Current-Class-Action-Cases/Long-Term-Care-Covid-19.shtml>. An example of this could be *Williams*, *supra* note 33, where a motion to strike was largely unsuccessful, and proceeded on both negligence and *Charter* claims. Even with the negligence claims struck, the *Charter* claims would remain.